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It is said with much force that inasmuch as there can be no sentence without the joint belief of the jury in the prisoner's guilt, and of the judge in the deserts of the offender, where he has any discretion to exercise, the views of the judge are to be respected.

In the present case there was no fixed penalty. It might be imprisonment in the state prison, or it might be a short imprisonment in the county jail, or a fine not exceeding five hundred dollars, but with no minimum amount required to be imposed. In other words, it was recognised by the legislature that such offences might be of trifling enormity, and not worthy of serious notice.

Sentences may be suspended for various purposes. It may be for the purpose of allowing steps to be taken for a new trial or other relief, or it may be with a view of letting the offender go without punishment. The release of a defendant on his own recognisance and without sureties, in a merely nominal amount, signifies usually the latter purpose. It at least is a plain assertion of the judge that he did not regard the offence as one that should receive a serious punishment. The failure to take steps during the October Term of 1874, was a practical abandonment of the prosecution, and corroborates the opinion that such must have been understood as the object of the suspension, and as the record stands it is fairly to be inferred it was intentional. To sentence a prisoner to the penitentiary under such circumstances, and when the trial judge has distinctly said he ought not to be so sentenced, is not supplying his omissions, but is overruling his decision. This we think is not admissible, and the sentence was unauthorized, and the judgment must be reversed, and the prisoner discharged.

Court of Appeals of New York.

WILLIAM LEETCH, RESPONDENT, v. ATLANTIC MUTUAL INSURANCE CO., APPELLANT.

In all contracts of marine insurance there are certain implied conditions which are of the same force as if written in the policy, and are distinguishable from mere representations.

Among these conditions, in case of an insurance on cargo, is that it shall be stowed in a safe and proper manner and in the usual and customary place for the carriage of goods of the kind insured. Any breach of this condition by which the risk is varied and the perils increased avoids the policy.

The testimony of experts and particularly of underwriters is always admissible upon the question of the materiality of circumstances affecting the risk.

Gold being stowed in the rear of the vessel under the cargo, and the testimony being clear that that was not the customary place and was a place of greater hazard than the cabin, where coin is usually stowed, the judge should have directed the jury, as a matter of law, that that was a material variation of the risk.

THIS was an action on a policy of marine insurance. The material facts were that gold was shipped at Laguna, consigned to New York, and was, at the time of lading, placed in the rear of the vessel, outside the cabin and under the ballast. At Minatitlan a cargo of mahogany was taken on board and filled the hold, thereby rendering the gold inaccessible. The vessel met with disaster and was abandoned at sea. The gold could not be reached and was not saved. Subsequently the vessel was found and towed into port, but on unloading no gold was found.

Samuel Hand and *Wm. G. Choate*, for appellant.

W. J. A. Fuller and *E. L. Fancher*, for respondent.

The opinion of the court was delivered by

ALLEN, J.—The question of most prominence, as it is the most important in this case, is as to the validity of the policy upon the gold, and the rulings of the learned judge at the trial in respect to it. There is no conflict of evidence or substantial dispute as to the facts upon which its validity is challenged by the defendant. The claim is that the specie was not stowed on board the vessel in the usual and customary place for the carriage of freight of that description, but that it was placed in an unusual part of the vessel, by which the peril was greatly increased and the risk essentially varied from that assumed by the underwriter. The evidence of the shipmasters, given upon the trial, was uniform, that the usual place for the carriage of coin or specie of any kind was either in some proper place in the cabin or in that part of the run of the vessel immediately under the cabin, and accessible from it by an opening in the floor with a trap properly fitted, so that it might be at all times under the immediate watch and care of the captain, and only accessible from the cabin. The masters of vessels, who were examined as witnesses upon this subject, had been engaged in trade to Mexican and South American ports, as well as to other ports and places, and all agreed that the usual and proper place for the safe-keeping of coin, carried as freight, was either in or

under the cabin, as stated. It was proved by one or more of the witnesses, and not disputed, that the only exception to this usage was when specie was taken out of the country clandestinely, in violation of the revenue laws, and to evade the payment of export duties, when it was sometimes concealed among the cargo or in other parts of the vessel, but never under the cargo. In such case, as soon as the vessel was at sea and the pilot had left the ship, the coin was invariably taken from its temporary place of concealment and deposited in the usual place. The same witnesses, and the only witnesses upon the subject who were experienced as navigators and masters of vessels, agreed that a deposit of coin under the ballast or under the cargo was unusual and increased the hazards and risk of loss to which it was exposed. In case of disaster, it was less accessible and could not be saved in whole or in part, as it might under ordinary circumstances and as usually stowed. This fact is so palpable, upon a mere statement of the different modes and places of stowage, that it needed not to be proved by experts. It was not denied that while under the freight, especially such as that laden on board the vessel in this instance, it was safer from barratry or theft than when stowed in the usual place; but even in such case, the risk of theft was greater when the vessel was unladen, and during that process, from its liability to be taken by stevedores and others who would have access to it. The claim of the plaintiff is that the gold was lost, not from the perils said to be diminished by the stowage resorted to, but by that which was confessedly increased. The gold, in the present instance, was suffered to remain under the ballast from the time it was placed there at Laguna, until the vessel sailed, and during the voyage from that port to Minatitlan, and until the cargo of mahogany was laden on board at the latter port. During all that time it is self-evident that it was exposed to equal if not greater peril from barratry and theft than if stowed in the usual place. There is no evidence, except that of the plaintiff, that the gold was seen on board the vessel after it was first laden at Laguna. Whether there was any necessity for the stowage of the gold in the hold of the vessel, outside of the cabin, while the vessel remained upon the coast and at the ports of Laguna and Minatitlan, which would justify a deviation from the usual course of lading, and of which the underwriters might be presumed or were bound to have known, and thereby to have assumed the varied risk, cannot be determined

upon the present record. These questions were not tried or decided by the trial court. The facts proved by these witnesses, and which are not controverted by any witness upon the trial, clearly and conclusively establish that the actual risk upon the gold was not the same as it would have been if stowed in the usual place, and that the risk of loss in case of disaster at sea, the peril by which it is claimed the gold was lost, was increased.

In addition to this evidence, several underwriters were called as experts, and they were unanimous in the opinion that the carriage of specie under the ballast and cargo did increase the risk, and that the fact that it was so carried was material to be known by an underwriter, and would affect his judgment as to accepting the risk ; and, if accepted, the rate of premium. But a single underwriter was called by the plaintiff, and his evidence did not detract from the force of or conflict with that given in behalf of the defendant. He testified that a stowage under the cargo would (in his own language) "of course," in some respects, increase the risk so far as the perils of the sea were concerned, and only diminish it as against barratry or theft on the part of the mariners. He also stated that when so stowed the risk would be different in character and different in kind from what it would be if the gold were stowed in the cabin or in the run immediately under the cabin.

The plaintiff, himself a witness upon the trial, stated that he had frequently shipped specie and carried it under the cargo and the timbers, in oat sacks, in the cook's coppers, and almost everywhere in the vessel where he deemed it most prudent, but he did not state under what circumstances he had so carried it, or that it was usual so to do, or that when so carried it was insured. Under objection that he had not shown himself competent to testify as an expert, he was permitted to testify that in his opinion the risk would not be any greater for the safety of the specie whether stowed under the cargo or in any other place on the vessel, and that it would be safer under the cargo against barratry and theft. His testimony was not in conflict with, but rather in corroboration of, the testimony of the other witnesses, except in the statement that the gold was equally safe in any part of the vessel. It is well settled that the testimony of experts, and especially of underwriters, as such, is admissible upon the question of materiality of circumstances affecting the risk : *McLanahan v. The Universal Ins. Co.*, 1 Peters

170; 3 Kent's Com. 284. When evidence of this character is necessary for the reason that the fact is not sufficiently obvious to enable the court to decide it without aid, the testimony is to be treated as testimony of credible witnesses upon any other fact; and if there is no conflict, the fact of materiality or immateriality must be held as all the witnesses testify. If there is a difference of opinion, it then becomes a question of fact for the jury. In every contract of marine insurance there are certain implied stipulations and conditions which are of the same obligatory force as between the parties as if expressed in the policy, and make a part of the contract, and are distinguishable from mere representations: Arnould on Ins., 4th ed., 589. Among the conditions in case of an insurance upon cargo implied by law, is that it shall be stowed in a safe and proper manner, and in the usual and customary place for the carriage of goods of the description insured, and any breach of this warranty by which the risk is varied and the perils insured against increased, vitiates the policy. A policy upon merchandise is vitiated by a breach of the implied warranty that the conveying ship is seaworthy, although the shipper of the goods is innocent and has no interest in the ship: Arnould on Ins. 591. The insurers, assuming risks which the insured is unwilling to bear, can only be held to those risks which they have voluntarily and knowingly undertaken, and the insured has no right to substitute any others in the place of those assumed: 2 Pars. on Ins. 2; *Hartley v. Buggin*, 3 Doug. 39; *Maryland Ins. Co. v. Le Roy*, 7 Cranch 26. In *Blackett v. The Royal Ex. Assurance Co.*, 2 C. & J. 244, Lord LYNTHURST, C. B., says: "On an insurance upon goods, the underwriter is entitled, in general, to expect that they shall be carried in that part of the ship usually appropriated to the stowage of goods, not in a more dangerous part," and adds: "If he were to be made answerable for extraordinary peril, he would be answerable for a peril he had not contemplated, and for which he had not received an adequate compensation." To this principle may be traced the rule which excludes deck cargoes from the protection of an ordinary policy of insurance: 1 Pars. on Marine Ins. 529. In *Brooks v. The Oriental Ins. Co.*, 7 Pick. 259, the underwriter was held not to be liable upon a valued policy upon a ship for a hawser lost overboard, which was stowed in the boat on deck instead of having been stowed in the hold with the cables on the passage, the court saying that it was a matter of common information that

it should have been stowed in the hold. Here we have the uncontradicted evidence of an established usage as to the proper place for the stowage of gold and the patent and obvious fact that the usual place is the safer place for carrying it. It is only where there is a doubt as to the materiality of a representation or of any deviation or change of risk, that it falls exclusively within the province of a jury. A nonsuit was sustained by the court *in banc*, in the *Taunton Copper Co. v. The Merchants' Ins. Co.*, 22 Pick. 108, upon the ground that the merchandise, which was copper in pigs, had been stowed upon deck instead of being put under deck, and this, notwithstanding a general usage for forty years to carry goods not liable to be injured by dampness on deck, was proved. The court were of the opinion that the usage stopped *in limine*, and that the insured should have proved, in addition, that it was usual for underwriters to pay for goods when carried on deck. The plaintiff's claim and proof in this case is equally defective. There is no pretence that any underwriter has ever paid for coin lost when stowed in this way, and insured by a policy in the ordinary form. The question in *Rickards v. Murdock*, 10 B. & C. 527, was as to the materiality of a direction from the insured to the broker, to wait thirty days after the receipt of the letter giving the directions before effecting the insurance. It was held that evidence of the underwriter's opinion was properly received, and that even without it the jury would have been bound to find that that part of the letter not communicated to the underwriters was material, and that consequently the policy was void. *Da Costa v. Edmonds*, 4 Camp. 143, was an action upon a policy of insurance on forty carboys of vitriol, and the plaintiff had a verdict upon proof of usage to carry vitriol on the deck, of which usage the underwriters were bound to take notice. Lord ELLENBOROUGH instructed the jury that the underwriters were not liable if the goods were carried on deck without such usage, or if they were not stowed there in a skilful and proper manner. The only questions left to the jury were as to the usage, and whether, if the usage was established, the carboys were properly stowed. The question of materiality was not submitted. See also, *Merchants' Ins. Co. v. Alger*, 32 Penna. St. 330; Marshall on Ins. 348, 349; *Millward v. Hibbard*, 3 A. & E. (N. S. Q. B.) 120; *The Delaware*, 14 Wall. 579. The Commission of Appeals in *Appleby v. The Astor Fire Ins. Co.*, 54 N. Y. 253, reversed a judgment in an action

upon a policy of fire insurance, for error of the judge at circuit, in refusing to direct a verdict for defendant upon the ground that the risk had been materially varied and increased by the introduction into the building of the business of finishing chairs which had been manufactured in the rough elsewhere. The court held that it was not a case to be sent to a jury, but that the defendant was clearly entitled to a verdict and judgment. Upon a reconsideration of the case upon a motion for a re-argument, the court say: "As an ordinary rule it may be safely assumed that upon an undisputed state of facts, the court in which an action is pending may render the judgment which the law requires, without the aid or advice of a jury, and that such action by the court does not violate any of the maxims of the law." The fact being undisputed that the gold for which this action was brought was not stowed in the usual place, but in another part of the vessel, where it was exposed to a different risk (and to increased hazard, save only against barratry and theft) from that to which it would have been exposed had it been stowed where the defendant had a right to assume it would be stowed, it follows, as a very plain proposition, that the stowage under the ballast and cargo was a fact material to the risk, and the judge should have so charged the jury as requested. The judge should also have charged, as he was requested to do, almost in the very language and according to the evidence of the only underwriter examined as an expert in behalf of the plaintiff, that the risks to which the gold was exposed in this unusual place, were different in kind or degree from those to which it would have been exposed if stowed in the usual place for the stowage of specie. If these questions depend upon the testimony of witnesses the evidence was conclusive, and a verdict in disregard of it should have been set aside, and the defendant was therefore entitled to a direction for a verdict in accordance with it. If the questions were for the court and jury, irrespective of the testimony of experts, as to the materiality of the change of place for the stowage, then, as a matter of law, the defendant was entitled to a verdict upon this policy upon the evidence and upon the direction of the judge and the finding of the jury, that the stowage of specie under the ballast and cargo was stowage in an unusual manner and place, and that the fact of such stowage was concealed from the defendant. There was no room or place for holding, either by the court or jury, that such unusual stowage was a fact not material to the risk. Its ma-

teriality is too obvious to be submitted to a jury, and it was error to permit a verdict to pass for the plaintiff upon the ground of the immateriality of this fact under the circumstances of this case. The risk was not the risk assumed by the defendant, and the policy never attached. It is sufficient that the risk resulting in loss was not the same as that assumed by the defendant. The underwriter had the right to elect whether he would assume the actual risk and to fix the premium, but it was also an increased risk. If the facts can be varied upon a retrial, the plaintiff may, upon some ground other than that already considered, recover; but, upon the exceptions taken at the trial, defendant, upon this branch of the case, is entitled to a reversal of the judgment.

These views render it unnecessary to consider many of the exceptions taken by the defendants upon the trial, some of which present questions of interest, but as they mostly relate to the shipment of gold, they become unimportant if the gold was not covered by the policy. Among the questions thus eliminated from the case as presented, is the alleged illicit character of the voyage, and its effect upon the contract. Many of the questions of evidence are also unimportant by reason of the effect given by us to the undisputed evidence and the clear change in the risk by the irregular stowage of the gold. Whether the policies were procured by false representations in respect to the character, credit, position and history of the plaintiff, was properly submitted to the jury. The evidence that the policies were issued in reliance upon such representations, was not so clear and conclusive as to authorize a withdrawal of the question from the jury. The testimony of the vice-president of the defendant is explicit that he should have declined the risk upon the gold had he supposed that it was to be stowed under the ballast or the cargo, but when he comes to speak upon the effect and influence of the representations in respect to the plaintiff, he is not as explicit, but says he should have depended a good deal upon the standing of the house offering the risks, and leaves it somewhat in doubt as to the extent his action was influenced, in taking the risks, by the statements made to him in respect to the personal character and standing of the plaintiff. Again, there was evidence touching the actual character, history and standing of the plaintiff, and the truth of the statements made to the defendant, which made it eminently proper that the whole question upon this branch of the defence should be submitted to the jury.

Several exceptions were taken to the exclusion and admission of evidence upon minor points, which, as they may not be repeated upon another trial, we do not deem it important to consider. Exceptions were also taken to several of the refusals of request by the defendant to charge the jury, none of which we deem it important to refer to.

For the errors suggested, and without considering the other questions which will not necessarily arise upon another trial, the judgment must be reversed, and a new trial granted, costs to abide the event.

Supreme Judicial Court of New Hampshire.

CHANDLER v. COE.

In accordance with the provisions of the Revised Statutes of the United States, enacted June 22d 1874, and the subsequent Act of Congress of March 3d 1875, a cause will not be removed from a state court to the Circuit Court of the United States, unless the petition for such removal be filed in the state court before or at the term at which said cause could first be tried, and before the first trial thereof.

Such petition will not, therefore, be entertained, when filed in the state court after a verdict in the cause has been rendered, notwithstanding the verdict may have been set aside for error and a new trial ordered.

THE plaintiff was a citizen of New Hampshire. The defendants were citizens of Maine. The defendant, S. R. Bearce, is now dead, and his death has been suggested on the record. The cause was tried by jury at the November Term 1873 of the Supreme Judicial Court, resulting in a verdict for the plaintiff. That verdict was set aside by the whole court at the June Term 1874, and a new trial granted. At the November Term of the Circuit Court 1874, upon petition of the defendant, an order was entered on the docket for the removal of the cause to the federal court, an affidavit and bond being filed in accordance with the Act of Congress of 1867. At the present term the cause stood upon the printed docket, and, although copies in due form had been made out by the clerk at the request of the defendants, to be entered in the United States Circuit Court, the cause had not been actually entered there, the copies had not been taken from the manual custody of the clerk, and no term of said United States Circuit Court had intervened.

The plaintiff moved that the order of removal, made at the last November Term, be rescinded. This motion was granted by the court, and the defendants excepted. All questions of law and dis-